Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1633

THOMAS ARTHUR GARRIGAN,
Petitioner,

vs.

ROBERT F. GIESE; MRS. M. S. LINGAFELTER; EDWARD D. HANLON; C. E. DAVIS; HOWARD W. WILSON; BG GEORGE M. BUSH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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THOMAS ARTHUR GARRIGAN,
Petitioner,

vs.

ROBERT F. GIESE; MRS. M. S. LINGAFELTER; EDWARD D. HANLON; C. E. DAVIS; HOWARD W. WILSON; BG GEORGE M. BUSH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioner, Thomas Arthur Garrigan, prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on February 24, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not reported as of this date and is reprinted in the Appendix hereto at page A-2. The Eighth Circuit's order of March 15,

1977 denying the Petition for Rehearing is reprinted in the Appendix at page A-1. The other opinions below are also reprinted in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 24, 1977. Petition for rehearing was denied by order of the Eighth Circuit on March 15, 1977. This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Can the Doctrines of Res Judicata and Estoppel by Judgment Be Used as a Two-Edged Sword to Prevent and Thwart the Ends of Justice? Can These Doctrines Be Used to Deny Petitioner, a Veteran's Preference Employee, His Day in Court?

STATEMENT OF THE CASE

A brief summary of the petitioner's problems must be furnished to the Court due to the fact that he has been attempting to secure a hearing or day in court for years without any success.

In the year 1970, petitioner Thomas Arthur Garrigan was unlawfully and illegally reduced in grade during a "reduction in force", said reduction being in direct violation of the Veteran's Preference Act, 5 U.S.C. 851, et seq. and further in direct violation of the "rules of the agency". Petitioner filed a grievance as directed and has exhausted his administrative remedies. Further violations of the "rules of the agency" occurred in the administrative remedy process as petitioner was basically given the run-around.

Having been frustrated for a couple of years by the "administrative remedy", petitioner then filed a claim in the U.S. Court of Claims on or about November 30, 1973, seeking the only remedy one can seek in the Court of Claims, money. Jurisdiction in the Court of Claims was based on 28 U.S.C. 1491, the limited jurisdictional statute of said court. Again the petitioner was frustrated and did not receive his "day in court" although the Supreme Court of the United States and the other courts have consistently stated that "a person should and must be given the opportunity to litigate his claim and have his day in Court." In the Court of Claims, Cause No. 454-73, there was NO HEARING, NO OPPORTUNITY TO BE HEARD, NO EVIDENCE HEARD AND NO SEMBLANCE OF DUE PROCESS. Although the Court of Claims issued an Order Dismissing the Petition of the Plaintiff Garrigan, the Court in said Order "questioned its own jurisdiction" to award any relief.

Having been further frustrated by the long, drawn out procedure in the Court of Claims which basically involved the mailing of documents back and forth, the petitioner Garrigan filed a suit in the United States District Court in Missouri, Cause No. 75-276 C (4) on or about March 21, 1975. This suit was dismissed by Judge Nangle by Order dated August 21, 1975 on the "actual basis that there was another case pending in the U.S. Court of Claims". Needless to say, there was no hearing, no opportunity to be heard, no evidence heard and no semblance of due process in the district court case.

In summary of prior proceedings, petitioner Garrigan had attempted to bring a claim in the limited jurisdiction Court of Claims and said claim was dismissed by Order dated April 25, 1975, said dismissal being further finalized by Order dated October 10, 1975 which denied request for rehearing in Court of Claims. Further, petitioner Garrigan had attempted to bring a claim in the United States District Court, but said suit was dismissed on the basis that there was a suit pending in Court

of Claims. Although said Orders purported to be based on the merits, they were actually based on technical and procedural grounds and it is undisputed that petitioner Garrigan DID NOT RECEIVE HIS DAY IN COURT either in the Court of Claims or in the District Court.

Having suffered frustration for almost six years and having been denied a hearing every place he turned, petitioner Garrigan then filed a suit in the United States District Court in Missouri, Cause No. 76-62 C (A), in early 1976, again seeking to get a hearing and again seeking some semblance of due process. Petitioner concedes that his petition and complaint were inartfully drawn as petitioner Garrigan filed said suit pro se and he is not skilled in the law. Petitioner only sought to finally obtain a hearing and the United States District Courts have jurisdiction of "causes of action" such as plaintiff's under numerous jurisdictional statutes, including the mandamus statutes, the Declaratory Judgments statutes, diversity of citizenship statutes, federal question statutes and so on. Although petitioner admits that his "cause of action" is similar to the complaint in the Court of Claims, the cause of action necessarily differs due to the fact that the Court of Claims is a court of "limited jurisdiction" in its very inception.

The United States District Court, Judge Roy W. Harper, entered Judgment for Defendants with Memorandum Opinion, dated July 27, 1976, said Opinion being reported at 420 F. Supp. 68 (*Garrigan v. Giese, et al.*); said Judgment dismissed the petitioner's complaint with prejudice "without granting leave to amend" on the basis of the doctrines of res judicata and estoppel by judgment.

In summary, after seven years, petitioner Garrigan has still been frustrated and thwarted in his attempt to get a hearing on his causes of action before a Court and in his attempt to receive some semblance of due process.

REASONS FOR GRANTING HIS WRIT

This case and more particularly the question presented involves a very important question concerning the relationship between the limited jurisdiction Court of Claims and the broader jurisdiction United States District Courts and also involves a very important question concerning the doctrines of res judicata and estoppel by judgment where there has never been a hearing on the merits and where these doctrines have been used as a two-edged sword to prevent the petitioner from having his "day in court" which is a basic constitutional right assumed by every citizen of the United States. The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of plaintiff's complaint on the basis of "res judicata and estoppel by judgment" despite the fact that the "judgments" used as a basis were not judgments on the merits, but were judgments based solely on the technical grounds of a question of jurisdiction in the Court of Claims and a question of the pending suit in the first United States District Court case. As the Supreme Court of the United States recently decided, *United States v. Testan*, 424 U.S. 392, 47 L.Ed.2d 114, 96 S.Ct. 948 (1976), the Court of Claims is a court of limited jurisdiction and parties going to said court may have proper remedies in the district courts due to the fact that the Court of Claims has its jurisdiction clearly limited by 28 U.S.C. 1491.

The Eighth Circuit's opinion virtually ignores the long established principle that the doctrines of res judicata and estoppel by judgment cannot be used unless the party being precluded has had "one full and fair opportunity for judicial resolution" and has had "his guaranteed right once to be heard on the substance of his claim". *Saylor v. Lindsley*, 391 F.2d 965 (2nd Cir. 1968). The courts have further stated that when traditional concepts of res judicata do not work well, they should be relaxed or qualified to prevent injustice and petitioner states that "injustice"

has ben worked on petitioner by use of the doctrine against him.

The opinion "assumes" that the Court of Claims judgment was "on the merits" when the fact is that the Court of Claims "questioned its own jurisdiction" and the opinion correctly noted that the first United States District Court dismissal was on the basis that a "suit was pending in Court of Claims". Nevertheless, the Court affirmed the dismissal as if there had been a decision on the merits and as if petitioner had been accorded his day in court.

The Eighth Circuit's opinion also discusses the case of *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F. 2d 840 (3rd Cir. 1974), but fails to discuss or admit that this decision, as well as numerous other court decisions, speaks of the basic fairness which must be afforded prior to any preclusion by these doctrines. It further ignores the premise that prior to any issue preclusion, the other court judgment must not only be on the merits, but must necessarily have included a decision on the merits of the issues. Surely, it is apparent that the issues in an action in the nature of mandamus or declaratory judgment would not be identical with any issues in the Court of Claims, but the Eighth Circuit does not discuss this problem.

Under the Eighth Circuit's opinion, any judgment, whether on the merits and whether the issues are the same and whether the issues were necessarily decided in prior judgment, may and will be considered under the doctrines of res judicata and estoppel by judgment to preclude and bar the bringing of an action. When it is considered that first, the Court of Claims is a court of limited jurisdiction and second, that the district court judgment was on purely technical grounds, then petitioner states and urges that this decision of the Eighth Circuit goes far beyond the present state of the law and is a dangerous PRECEDENT FOR INJUSTICE.

Petitioner states that this Court has held that the prerequisite of final judgment on the merits is closely tied to the inherent right of a litigant to some semblance of due process and to a litigant's right to his day in court which means "one full and fair opportunity to be heard on the substance of his claim". In the instant case, petitioner has never received this one vital opportunity; but has been impaled on the horns of a dilemma by procedures with which he was not familiar.

Petitioner further states that this Court has held in the *Testan*, supra, case that a litigant in a case such as that of petitioner may well have a remedy in the district court even though his remedy in the Court of Claims is limited due to the "limited jurisdiction" of the Court of Claims. Although there would necessarily be some overlap of issues, the issues would not and could not be the same due to the different nature of the cause of action, mandamus or declaratory judgment versus suit for monies.

This Court has always held that a "veteran's preference employee" is a person who should be treated in a fair and just manner under the laws of this country, including the Veteran's Preference Acts passed by Congress. *Service v. Dulles*, 354 U.S. 363 (1957); *Watson v. United States*, 162 F. Supp. 755 (Ct. Claims (on remand) 1958); *Hilton v. Sullivan*, 334 U.S. 323 (1948). If the decision of the Eighth Circuit is permitted to stand, then this "preference" given by Congress and protected by this Court is and will be of no value in the future as procedure, not justice or substance, will again rule. Although one could read the Eighth Circuit's opinion literally and come away with the feeling that it was solely based on the res judicata question, petitioner urges this Court to look at the substance and see that petitioner, a veteran's preference employee, is being effectively denied his rights including his right to due process and day in court.

Petitioner respectfully submits, the premises considered, that this Court should review the Eighth Circuit's opinion herein for the purpose of clarifying that before a court should use the res judicata and estoppel by judgment doctrines, that court must examine the matter fully to insure that the judgment was on the merits, which necessarily includes a hearing on the substance of the person's cause of action and a day in court; further that court must determine whether the person has alternative or different causes of action due to the limited jurisdiction of a court.

As important, this Court also should grant the writ of certiorari to continue its protection of veteran's preference employees from abuse. *Reynolds v. United States*, 292 U.S. 443 (1934). The Eighth Circuit's opinion actually deprives the petitioner of any possibility for a day in court.

Petitioner acknowledges that his complaint and petition was poorly drafted and needs revision to state a proper cause of action, but petitioner further states that he must be given the opportunity to amend his complaint in this case so that petitioner may finally secure his day in court after **SEVEN YEARS** of technicalities and procedure which have denied him a hearing on the substance of his claim. It is obvious that petitioner can state a cause of action for mandamus or declaratory judgment, but he has been denied the opportunity to do so by the opinion of the Eighth Circuit.

CONCLUSION

By reason of the foregoing, petitioner respectfully submits that this petition for a writ of certiorari should be granted and the judgment of the United States Court of Appeals for the Eighth Circuit be reversed or modified and that petitioner should be permitted to file amended complaint.

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APPENDIX

United States Court of Appeals
for the Eighth Circuit

76-1664 September Term, 1976

Thomas Arthur Garrigan, Appellant, vs. Robert F. Giese, et al., Appellees.	Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

March 15, 1977

United States Court of Appeals
for the Eighth Circuit

No. 76-1664

Thomas Arthur Garrigan,
Appellant,
v.
Robert F. Giese; Mrs. M. S. Lingafelter; Edward D. Hanlon; C. E. Davis; Howard W. Wilson; BG George M. Bush,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: February 10, 1977

Filed: February 24, 1977

Before Lay, Bright and Webster, Circuit Judges.

Per Curiam.

This is an appeal from the order of the District Court[1] dismissing appellant's complaint and granting summary judgment in favor of appellees. The basis of appellant's complaint was a reduction in force that resulted in a lowering of his civil service grade from GS-9 to GS-5 during the period from July 6, 1970, to June 18, 1972. Appellant alleged that appellees conspired against him in devising the reduction in force. Jurisdiction was predicated upon diversity of citizenship, 28 U.S.C. § 1332. Appellant sought actual damages in the amount of $5,000 and $50,000 in punitive damages.

[1] The Honorable Roy W. Harper, United States District Court for the Eastern District of Missouri.

The District Court in a well-reasoned opinion held that appellant was barred from bringing this action by the doctrines of res judicata and estoppel by judgment.

The present action constitutes the third suit brought by appellant concerning his grade reduction. In November, 1973, he brought suit against the United States in the Court of Claims, alleging wrongful reduction-in-force action. Jurisdiction was based on 28 U.S.C. § 1491. The Court of Claims noted that the Civil Service Commission had previously examined appellant's grievance and had found he was not qualified for the position he claimed. The court held he had failed to overcome the presumption that the Commission's action was correct. It granted the government's motion for summary judgment and denied appellant's motion for a rehearing.

In March, 1975, while the Court of Claims decision was still pending, appellant filed a second suit against the United States on the same claim in the District Court for the Eastern District of Missouri. The District Court granted the government's motion for summary judgment and dismissed appellant's petition with prejudice. No appeal was taken from that order.

Then, in July, 1976, he brought the instant action, also in the District Court for the Eastern District of Missouri, this time naming as defendants certain Army employees who participated in his administrative appeal of the reduction-in-force action. He based his jurisdiction on diversity of citizenship and alleged the existence of a conspiracy. The District Court concluded that all the requirements for application of res judicata and estoppel by judgment were met; it granted appellees' motion to dismiss and awarded judgment in their favor. After full con-

sideration of the issues presented and the briefs of the parties, we affirm on the basis of Judge Harper's opinion.[2]

A true copy.

Attest:

Clerk

U. S. Court of Appeals
Eighth Circuit

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[2] Judge Harper's opinion is published at — F. Supp. —.

The District Court concluded that appellees are privies of the United States, the defendant in appellant's prior suits, and that the mutuality required by classical estoppel doctrine thus existed. This finding is not necessary to the result reached by the District Court, *see Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 844 (3d Cir. 1974); *Cardillo v. Zyla*, 486 F.2d 473, 475 (1st Cir. 1973); *Rachal v. Hill*, 435 F.2d 59, 61-62 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971); *Zdanok v. Glidden Co.*, 327 F.2d 944, 954-55 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); and we express no opinion on the correctness of this finding.

In the United States District Court
Eastern District of Missouri
Eastern Division

Thomas Arthur Garrigan, Plaintiff.		
vs.		
Robert F. Giese, Mrs. M. S. Lingafelter, Edward D. Hanlon, Mr. C. E. Davis, Howard W. Wilson, BG George M. Bush, et al., Defendants.		No. 76-62C (A).

JUDGMENT

In accordance with the Memorandum Opinion of the Court this day filed which is incorporated in and made a part of this judgment;

It is Ordered and Adjudged that judgment be and hereby is entered in favor of defendants Robert F. Giese, Mrs. M. S. Lingafelter, Edward D. Hanlon, Mr. C. E. Davis, Howard W. Wilson, BG George M. Bush, et al., and against the plaintiff, and both Counts I and II of plaintiff's complaint are hereby dismissed with prejudice.

WILLIAM D. RUND
Clerk
United States District Court

Entered by direction of the Court this 27th day of July, 1976.

In the United States District Court
Eastern District of Missouri
Eastern Division

Thomas Arthur Garrigan,
Plaintiff,
vs.
Robert F. Giese, Mrs. M. S. Lingafelter, Edward D. Hanlon, Mr. C. E. Davis, Howard W. Wilson, BG George M. Bush, et al.,
Defendants.
No. 76-62C (A).

MEMORANDUM OPINION

Plaintiff, Thomas Arthur Garrigan, pro se, brings this action against defendants, Robert F. Giese, Mrs. M. S. Lingafelter, Edward D. Hanlon, C. E. Davis, Howard W. Wilson, BG George M. Bush, et al., seeking damages for an alleged conspiracy to wrongfully bring about a reduction in force, which reduced plaintiff in his civil service grade from GS-9 to GS-5. While the named defendants in the above caption includes the phrase "et al.", the only parties against whom the plaintiff sought to obtain service were the above named defendants.

On February 3, 1976, the U. S. District Attorney on behalf of the defendants, Edward D. Hanlon and Howard W. Wilson, filed a motion to dismiss, which said motion sets forth five separate grounds for dismissal.

Thereafter, on June 4, 1976, the U. S. District Attorney on behalf of defendants, Robert F. Giese, Mrs. M. S. Lingafelter, C. E. Davis and BG George M. Bush, filed a motion adopting the motion to dismiss filed on March 30, 1976, by Edward D. Hanlon and Howard W. Wilson.

The Court on July 15, 1976, ordered that the motion to dismiss be treated as a motion for summary judgment, and granted plaintiff ten days from receipt of notice of the order to file extra-pleading material in opposition to the motion. The plaintiff's only response to the Court's order was to file on July 21, 1976, a motion to deny or dismiss defendants' motion for summary judgment. No exhibits or affidavits were filed with said motion. While other motions have been filed by the defendants, the Court will not rule on such motions in view of the Court's ruling on the motion for summary judgment.

The motion to dismiss being treated as a motion for summary judgment sets forth five grounds for dismissal, the first of which raises the question of res judicata and the doctrine of estoppel by judgment which, defendants contend, precludes plaintiff from asserting the claim in his complaint. In view of the Court's ruling with respect to this matter the Court will not pass upon the other alleged grounds set out as reasons for dismissal. In this connection, however, it should be pointed out that the fifth ground attacks the jurisdiction of the Court, alleging that the controversy is not between citizens of different states, but there is no evidence or affidavits before the Court at this time which would enable it to do other than overrule this ground of the motion.

The defendants contend that plaintiff's action is barred by the doctrine of res judicata or by estoppel by judgment because it is the third such suit brought upon the same claim. The material facts are not in dispute. An examination of Exhibit A which is attached to the defendants' motion discloses that plaintiff had filed a petition in the United States Court of Claims on November 30, 1973, wherein Garrigan was the plaintiff and the United States was the defendant, Cause No. 454-73. In that action, plaintiff had also alleged wrongful Reduction-in-Force action which reduced him in his Civil Service Grade from

GS-9 to GS-5. Jurisdiction of that court was predicated upon 18 USC 1491.

In response to defendant's motion for summary judgment, the Court of Claims noted that the Civil Service Commission (hereinafter referred to as the CSC) had previously examined plaintiff's grievance at the request of the Department of Army and by plaintiff's consent. The CSC had found that plaintiff was not qualified for the position which he now claims and which he says was held by others with lower retention rights. In their decision, the Court of Claims held that plaintiff had failed to overcome the presumption that the CSC's action was correct. They also noted that after a hearing and after the CSC's determination, the Army Material Command had also denied plaintiff's request. Therefore, upon finding no legal or procedural error, or evidence of arbitrary or capricious action or abuse of discretion by either the Army or the CSC, the Court of Claims granted defendant's motion for summary judgment. (See Exhibit B attached to defendants' motion.) By an order dated October 10, 1975, the Court denied plaintiff's motion for a rehearing. (See Exhibit C attached to defendants' motion.)

On March 21, 1975, while the Court of Claims decision was pending in the above action, Garrigan filed a second suit, in the District Court for the Eastern District of Missouri, styled *Garrigan v. United States*, Cause No. 75-276C(4) (See Exhibit D attached to defendants' motion), which was based upon the same claim. There, too, Garrigan sought money damages for the same allegedly unlawful Reduction-in-Force action. The defendant filed a motion to dismiss and based it upon the fact that claims in both lawsuits were identical. On July 22, 1975, Judge Nangle ordered that defendant's motion be treated as a motion for summary judgment pursuant to Rules 12(b)(6) and 56, FRCP, and gave the plaintiff ten days within which to file extra-pleading material (See Exhibit E attached to defendants' motion). Plaintiff failed to file any extra-pleading material. Thereafter, on August 28, 1975, after having considered the pleadings and extra-pleadings material filed, Judge Nangle was of the opinion that there was no genuine issue of material fact and he granted the defendant's motion for summary judgment against plaintiff (See Exhibit F attached to defendants' motion). This Court takes judicial notice of the fact that Garrigan did not appeal Judge Nangle's order of August 28, 1975.

As the defendants point out, there are only three distinctions worth noting between Garrigan's present petition and his two previous ones: (1) In lieu of the United States, plaintiff names as defendants certain employees of the Army who participated in his administrative appeal of the Reduction-in-Force action; (2) Plaintiff's present petition alleges a conspiracy between those Army employees who brought about his allegedly unlawful Reduction-in-Force; and (3) Jurisdiction is now based upon diversity of citizenship.

These three distinctions present the question of whether the doctrine of res judicata or estoppel by judgment may serve to bar plaintiff's action here. In *C.I.R. v. Sunnen*, 333 U. S. 591, 597 (1947), the Supreme Court discussed, generally, the doctrine of res judicata:

> "The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose' (Citation omitted).

> The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment (Citation omitted)."

Application of the above rule would serve to preclude Garrigan from relitigating the same cause of action against privies of the United States. Here, however, Garrigan has brought a different action sounding in tort, specifically a conspiracy. It is the different nature of the second cause of action which raises the question of doctrine of estoppel by judgment. The distinction between estoppel by judgment or collateral estoppel and res judicata was described in *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 326 (1955), wherein the Supreme Court stated:

> "The basic distinction between the doctrines of res judicata and collateral estoppel, as those terms are used in this case, has frequently been emphasized. Thus, under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. (Footnote omitted)."

Under the above distinction between the doctrines of res judicata and collateral estoppel, it would appear that where a plaintiff has alleged a different cause of action against privies of the defendant from an earlier suit and bases it upon questions common to both suits, as was done here, the doctrine of collateral estoppel would preclude the same. In *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F. 2d 840, 844 (3rd Cir. 1974), the Court said:

> "It is commonly recognized that the following three requirements must be satisfied before collateral estoppel may be utilized:
>
> "a) The issue decided in the prior litigation must be identical with the issue presented in the action in question;
>
> "b) The prior litigation must have resulted in a final judgment on the merits; and
>
> "c) The party against whom the estoppel is asserted must have been a party, or in privity with a party, to the prior adjudication. (Citations omitted.)
>
> Classical estoppel doctrine appended a fourth element, a requirement of mutuality. This element mandates that the party asserting the estoppel also be a party, or in privity with a party, to the prior adjudication. *See* Restatement of Judgments, §93 (1942)."

A comparison of the pleadings in both the past and present cases indicates that all of the above requirements have been met here. With respect to the first question, the Court notes that the principal issue in each of Garrigan's suits has been the same, i.e., whether his reduction in grade was improper, arbitrary, capricious or an abuse of discretion on the part of either the Army or CSC. The Court of Claims' determination on the latter question effectually bars the plaintiff from relitigating it, regardless of plaintiff's new allegation that a conspiracy existed, because both actions are premised upon common questions and common facts. An "unlawful" objective cannot be pursued by conspirators where that objective and the pursuit of that objective have already been determined to be "lawful".

Second, the prior determinations made by both the Court of Claims and Judge Nangle constitute final judgments on the merits. A determination by summary judgment is as final a judgment as is a determination had after a trial or hearing on uncontroverted facts. *Keys v. Sawyer*, 353 F. Supp. 936 (S.D. Texas 1973).

Obviously the third requirement has been met because Garrigan, the party against whom the estoppel is being asserted, is the named plaintiff in each of the three suits in question.

Finally, even the fourth requirement of mutuality has been met here. The individual defendants, who are the parties asserting the estoppel in the case at bar, are the same Army employees who are either named in the Court of Claims petition or are, by their relationship to the Mobility Equipment Command, a part of the record in that case (See Exhibit G attached to defendants' motion). According also to their relationship to the circumstances surrounding the Reduction-in-Force action, it is obvious, under the above-cited cases, that the present defendants are privies of the previous defendant, the United States.

The Court is of the opinion that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law under Rule 56, FRCP.

Having found that plaintiff is barred from bringing this action by the doctrine of res judicata and estoppel by judgment, it becomes unnecessary to decide the remaining contentions of the defendants. Accordingly, for the above reasons, the motion of the defendants, Robert F. Giese, Mrs. M. S. Lingafelter, Edward D. Hanlon, C. E. Davis, Howard W. Wilson and BG George M. Bush, to dismiss plaintiff's complaint, which is being treated as a motion for summary judgment, is hereby sustained, and both Counts I and II of plaintiff's complaint are hereby dismissed with prejudice.

The Clerk of the Court is directed to prepare and enter the proper order to that effect.

/s/ ROY W. HARPER
U. S. District Judge

United States District Court
Eastern District of Missouri
Eastern Division

Arthur Garrigan, Plaintiff, vs. United States of America, Defendant.	}	No. 75-276 C (4)

ORDER

This action is before the Court upon the motion of defendant United States of America for summary judgment.

On June 3, 1975, defendant filed a motion to dismiss for the reason that the identical claims made by plaintiff Arthur Garrigan in the present suit had been previously presented by plaintiff to the United States Court of Claims. Defendant submitted plaintiff's petition in that court and a copy of the order of the Court of Claims, entered on April 25, 1975, giving summary judgment in favor of the United States of America and against plaintiff Garrigan.

On July 18, 1975, this Court ordered that defendant's motion to dismiss be treated as a motion for summary judgment and that plaintiff file extra-pleading material in opposition to the motion within ten days of receipt of the order. Plaintiff has not responded to the order.

After considering the pleadings and extra-pleading materials filed, the Court is of the opinion that there is no genuine issue of material fact and that the defendant is entitled to a judgment as a matter of law. Fed. R. Civ. Pro. 56(c).

Therefore,

It Is Hereby Ordered that the motion of the defendant for summary judgment against plaintiff be and is granted and the action is hereby dismissed with prejudice.

/s/ JOHN F. NANGLE
United States District Judge

Dated: August 27, 1975.

United States District Court
Eastern District of Missouri
Eastern Division

Arthur Garrigan, Plaintiff,
vs.
United States of America, Defendant.
No. 75-276 C (4)

ORDER

This action is before the Court upon the motion of defendant United States of America to dismiss the action for the reason that the claims made by plaintiff Arthur Garrigan in a petition in the United States Court of Claims are identical to those made in this action. By order filed April 25, 1975, the Court of Claims gave summary judgment in favor of the United States of America and against plaintiff Garrigan.

Copies of the petition filed by plaintiff before the Court of Claims and of the Court of Claims order, along with other extra-pleading material, were filed in support of the instant motion.

Therefore,

It Is Hereby Ordered that the instant motion to dismiss be treated as a motion for summary judgment and plaintiff shall have ten (10) days from receipt of this order to file extra-pleading material in opposition to the instant motion. Fed. R. Civ. Pro. 12(b)(6), 56.

/s/ JOHN F. NANGLE
United States District Judge

Dated: July 18, 1975.

In the United States Court of Claims

No. 454-73

Thomas Arthur Garrigan,
Plaintiff,

v.

The United States,
Defendant.

Before Skelton, *Judge*, Presiding, Kunzig and Bennett, *Judges*.

ORDER

This case is before the court on defendant's motion for summary judgment to defeat plaintiff's claim that he was improperly reduced in grade as a result of a reduction-in-force, by the Department of the Army. Plaintiff asserts alleged procedural errors and the right to "bump." He has exhausted his administrative remedies by a grievance appeal and an appeal to the Civil Service Commission. Plaintiff claims back pay and the right of reinstatement to the higher grade which he lost in the RIF. He also asserts that defendant was wrong in finding him unqualified for another job, AMMO Quality Control Specialist, GS-9, and says this is an issue of fact requiring trial.

We have carefully examined plaintiff's responses to defendant's motion but conclude that plaintiff has not stated a claim for which relief can be granted within the jurisdiction of this court. In short, what plaintiff claims is the right of appointment and a challenge to his classification. The Civil Service Commission was requested by the Department of the Army

in this case to make a qualifications determination. This was proper. 5 U.S.C. §§ 5105, 5110, 5112 (1970). Plaintiff agreed to this procedure at the time. The CSC found plaintiff not qualified for the position he claims and which he says was held by others with lower retention rights. The action of the CSC is presumed to be correct. Plaintiff has failed to overcome the presumption. After a hearing, and after the CSC determination, the Army Material Command denied plaintiff's grievance. We find no legal or procedural error, or evidence of arbitrary or capricious action, or abuse of discretion, either by the Army or the Civil Service Commission.

It Is Ordered, on the authority of *Wilmot v. United States*, 205 Ct. Cl. 666 (Dec. 1974); *DiRocco v. United States*, 201 Ct. Cl. 867 (1973); *Bookman v. United States* 197 Ct. Cl. 108, 116, 453 F. 2d 1263, 1267 (1972); *Tierney v. United States*, 168 Ct. Cl. 77 (1964); and *Donnelly v. United States*, 133 Ct. Cl. 120, 134 F. Supp. 635 (1955), that defendant's motion for summary judgment be and it is hereby allowed, and the petition is dismissed.

By the Court

By BYRON SKELTON
Judge, Presiding

April 25, 1975

Supreme Court, U. S.
FILED
JUL 5 1977
MICHAEL RODAK, JR., CLERK

No. 76-1633

In the Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS ARTHUR GARRIGAN, PETITIONER

v.

ROBERT F. GIESE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1633

THOMAS ARTHUR GARRIGAN, PETITIONER

v.

ROBERT F. GIESE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought suit against respondents, employees of the Army, in the United States District Court for the Eastern District of Missouri seeking actual damages for a reduction of petitioner's civil service grade resulting from an alleged wrongful reduction in force from GS-9 to GS-5 and punitive damages for an alleged conspiracy among the respondents in devising the reduction in force. The district court granted the respondents' motions for summary judgment, holding that petitioner's suit was barred by the doctrines of *res judicata* and collateral estoppel (Pet. App. A-6 to A-12). The court of appeals affirmed (Pet. App. A-2 to A-4).

The court of appeals' decision is correct and further review is unwarranted. The present suit is the third action filed by petitioner challenging his grade reduction. Petitioner's first suit, filed in the Court of Claims, challenged the reduction in grade as being arbitrary, capricious and an abuse of discretion. The Court of Claims granted the government's motion for summary judgment, noting that petitioner had agreed to the Civil Service Commission's qualifications determination and that the Commission had found him not qualified for the position he claimed (Pet. App. A-8).[1]

Prior to the Court of Claims' decision, petitioner filed in the United States District Court for the Eastern District of Missouri a second suit presenting identical claims. The district court dismissed that suit with prejudice, since in the interim the Court of Claims had decided the questions adversely to petitioner. Petitioner did not appeal (Pet. App. A-8 to A-9).

Petitioner then filed the present action in the same court, alleging a conspiracy among the named individual defendants to bring about his allegedly wrongful grade reduction. Both that court and the court of appeals concluded that "all of the * * * requirements [of *res judicata* and collateral estoppel] have been met here" (Pet. App. A-3, A-11) and

[1]Petitioner's contention that he has "been frustrated and thwarted in his attempt to get a hearing on his causes of action before a Court" (Pet. 4) is insubstantial. The Court of Claims considered the substance of petitioner's claim of wrongful reduction in grade and found that he had been accorded full procedural due process and that there was no "evidence of arbitrary or capricious action, or abuse of discretion, either by the Army or the Civil Service Commission" (Pet. App. A-17). Petitioner has had full consideration of his grievance by the Army, the Civil Service Commission and the Court of Claims.

that the Court of Claims decision barred this suit.[2] As the court noted, the principal issue in each suit—the lawfulness of petitioner's reduction in grade—was the same; the Court of Claims had entered a final judgment on the merits of that issue; and petitioner was the plaintiff in each suit.[3] There is no occasion for further review of that issue, which turns primarily on the facts of the particular case.

Petitioner argues that the new allegation in the present suit that a conspiracy existed is sufficient to remove the bar of collateral estoppel. Both causes of action, however, are premised upon common questions and facts. Cf. *Lawlor* v. *National Screen Service*, 349 U.S. 322. As the district court stated (Pet. App. A-11):

> [T]he principal issue in each of Garrigan's suits has been the same, i.e., whether his reduction in grade was improper, arbitrary, capricious or an abuse of discretion on the part of either the Army or CSC. The Court of Claims' determination on the latter question effectually bars the plaintiff from relitigating it, regardless of plaintiff's new allegation that a conspiracy existed, because both actions are premised upon common questions and common facts. An "unlawful" objective cannot be pursued by conspirators

[2]The district court also held that the present defendants are privies of the United States of America, defendant in the Court of Claims. The court of appeals did not discuss this ruling since it was unnecessary to the district court's decision (Pet. App. A-4 n. 2). See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313.

[3]Petitioner appears to contend (Pet. 5) that collateral estoppel does not apply because the Court of Claims' jurisdiction in this type of case was limited to the award of money damages. But that is the only relief petitioner sought in the present case, and if the Court of Claims had held in his favor, it would have awarded damages.

where that objective and the pursuit of that objective have already been determined to be "lawful".

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.